Supreme Court, U.S.
FILED
OCT 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 87-465

IN THE UNITED STATES SUPREME COURT

1987 TERM

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INTOWN INVESTORS, INC.,

Petitioner,

vs.

AVIS RENT A CAR SYSTEM, INC.,

Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEAL FOR THE SIXTH CIRCUIT

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# BRIEF OF RESPONDENT AVIS RENT A CAR SYSTEM, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE AND FACTS

The Complaint filed by Respondent Avis Rent A Car System, Inc. ("Avis")[1] on August 27, 1980 sought recovery of cost of living increases from Petitioner Intown Investors, Inc. ("Intown") and a declaratory judgment requiring Intown to pay to Avis all future cost of living increases under a certain sublease (the "Sublease") which Avis was required to pay pursuant to its lease agreement (the "99 Year Lease"). The district court had jurisdiction of the action pursuant to 28 U.S.C. § 1332.

The 99 Year Lease was entered into on June 1, 1954 between Avis' predecessor in interest and the lessors. This lease provided that at every ten year increment during the 99 year term the rent was subject to cost of living increases based upon a certain

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[1] Avis is a wholly owned subsidiary of Avis, Inc. All stock in Avis is presently held by the Citizens and Southern National Bank, Atlanta, Georgia, as Trustee under the Avis, Inc. Employee Stock Ownership Plan.

formula. During the term of the Sublease between Avis and Intown dated March 21, 1964, wherein Avis leased to Intown the property which was the subject of the 99 Year Lease, Intown refused to pay the cost of living increases which Avis was paying to its lessors under the 99 Year Lease.

The central issue at trial was whether the terms and conditions of the 99 Year Lease between Avis and its lessors were incorporated into the Sublease between Avis and Intown. At the close of evidence, Avis filed a Motion to Amend the Complaint to Conform to the Evidence seeking to add a claim for fraud; this Motion was based upon misrepresentations made by Intown's sole shareholder and operating officer, George Giancarli.

In his fifty-page Memorandum and Order, District Court Judge Thomas (1) declared the Sublease between Avis and Intown to be void for uncertainty and therefore non-renewable subsequent to May 1, 1984; (2) denied Avis' claim for past cost of living increases from Intown; (3) denied Avis' request to

reform the Sublease to incorporate past and future cost of living increases; and (4) denied Avis' Motion to Amend its Complaint to include a claim for fraud. On June 9, 1987, the United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment for reasons stated in Judge Thomas' Memorandum and Order.

On September 8, 1987, Respondent Avis received by ordinary United States mail Intown's Petition for a Writ of Certiorari. The Court's file will reflect that by letter dated September 10, 1987, Assistant Clerk Loretta S. Ruffin returned to Intown all copies of its Petition for failure to comply with certain of this Court's Rules. Despite the fact that Intown apparently thereafter filed a corrected Petition, Avis has not been served with same and even at this date has not been given the opportunity to review said Petition.[2]

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[2] This Brief in Opposition responds to the initial, nonconforming Petition which was served on Avis.

## ARGUMENT

### I. INTRODUCTION.

Intown asserts that this Court should exercise its discretion to review this case based upon the relief awarded by the district court and, ostensibly, because the district court ignored the ruling in Seitz v. Brewers' Refrigerating Machine Co., 141 U.S. 510, 35 L. Ed. 837, 12 S. Ct. 46 (1891) concerning the admissibility of parol evidence. Neither ground provides a "special" or "important" reason for this Court to grant the Petition.

This Court is well aware that, pursuant Rule 17 of the Rules of the Supreme Court of the United States, granting of a writ of certiorari is "not a matter of right" but, rather, will be "granted only when there are special and important reasons therefore." No such reasons exist in this case.

### II. A DISTRICT COURT MAY AWARD RELIEF NOT SPECIFICALLY REQUESTED BY THE PARTIES.

The district court was acting in accordance with statutes, established case law and the parties' own

acquiescence when it declared the "RENEWAL" clause of the Sublease void for vagueness.

Although the Complaint filed by Avis did not request specifically that the district court declare the Sublease unrenewable, it did ask the trial court to "fully adjudicate, declare and determine such rights and obligations under the lease agreements" and further asked the court to render, among other things, "any other relief this Court deems just and appropriate." Therefore, finding the Sublease essentially void for vagueness was well within the relief requested by Avis and within the relief contemplated by this lawsuit. Moreover, a court acting in equity, as was the district court in this case, has powers to "decide all matters in dispute and decree complete relief." Alexander v. Hillman, 296 U.S. 222, 242, 80 L. Ed. 192, 56 S. Ct. 204 (1935). See also, Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 81 L. Ed 789, 57 S. Ct. 592 (1937).

In addition to the fact that the Court's judgment was within the contemplation of the parties and was permissible under rulings of this Court, the award of such relief was also authorized by statute. Federal law provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2202. See also 28 U.S.C. § 2201(a). In this case, Intown should not be heard to argue at this late date that application of these statutes by the district court was improper inasmuch as both parties invoked such statutes. As indicated by the District Court in its Memorandum and Order at page 20 (see Appendix C attached to Intown's Petition):

> Under these circumstances, and the court having made these findings, it is determined that the dispute concerning the intent of the parties as to the meaning of the contested sublease language warrants this court in declaring the rights of the parties, pursuant to 28 U.S.C. §§ 2201 and 2202. Each party has requested that the court utilize this remedy. (Emphasis added).

In light of the fact that both parties contemplated that the court would declare fully the rights of each and that such declaration is supported by both case law and statutes, there is no question that the district court acted properly. Accordingly, Intown's first rationale in support if its Petition does not constitute a "special and important" reason for granting such Petition.

III. THE DISTRICT COURT'S RULING ON THE ADMISSIBILITY OF PAROL EVIDENCE DID NOT CONFLICT WITH OR OVERRULE SUPREME COURT PRECEDENT.

The District Court's evidentiary rulings did not violate the parol evidence rule and, accordingly, did not abandon this Court's decision in Seitz v. Brewers' Refrigerating Machine Co., 141 U.S. 510, 35 L. Ed. 837, 12 S. Ct. 46 (1891) ("Seitz").

The jurisdiction of the federal court in this case was based upon diversity of citizenship. Therefore, state law (in this case the law of Ohio) applied to substantive legal issues.

Ohio law is well settled: When there is ambiguity in a written contract, parol evidence is admissible to enable the court to determine the intent of the parties. E.g., Minnesota Mining and Manufacturing Co. v. Blume, 583 F. Supp. 493 (S.D. Ohio 1978), aff'd, 684 F.2d 1166 (6th Cir. 1982), cert. denied, 460 U.S. 1047, 75 L. Ed. 2d 803, 103 S. Ct. 1449 (1983). The Seitz case does not alter or affect this established principle. Accordingly, no "special and important" matter is raised by Intown when it complains about the trial court's ruling with respect to the admissibility of parol evidence.

IV. THE PETITION SHOULD BE DISMISSED FOR FAILURE OF INTOWN TO SERVE RESPONDENT WITH A COPY OF ITS CORRECTED PETITION.

As noted, supra, Intown's initial petition was rejected by Assistant Clerk Loretta S. Ruffin for failure to comply with certain of this Court's Rules. Ms. Ruffin's letter to Intown notifying it of such rejection is dated September 10, 1987. On October 24, 1987, the undersigned received from Intown's counsel a

form to be completed by counsel of record. On October 26, 1987, the undersigned telephoned Ms. Ruffin and learned for the first time that Intown's corrected Petition was docketed on September 18, 1987 and that Avis' Brief in Opposition was due on October 29, 1987, only three days later. Intown's conformed Petition was never served upon either the undersigned or his client, Avis.

The Rules of this Court clearly require that Petitions for Certiorari be served properly upon a respondent. Sup. Ct. R. 19.3; Sup. Ct. R. 28.3 and 28.5. The failure of Intown to serve such document upon Avis warrants dismissal of the Petition.

## CONCLUSION

Intown has not raised a "special and important" reason for granting its Petition. Moreover, Intown has not followed this Court's rules concerning service of

process. Thus, Avis respectfully requests that such Petition be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari was duly sent by ordinary United States mail to Christopher T. Cherpas and Thomas A. Teodosia, Attorneys for Petitioner Intown Investors, Inc., Teodosio, Cherpas & Manos, 907 Akron Savings Building, Akron, Ohio 44308, this 2nd day of October, 1987.

CHARLES M. ROSENBERG